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## **SAN CARLOS APACHE TRIBE**

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April 4, 2022

**Via E-Mail and U.S. Postal Service**

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**Re: Request for Tribal Consultation Regarding Residual Risk and Technology Review for  
Primary Copper Smelting**

Dear Mr. Carbonell and Mr. Goffman:

On behalf of the nearly 17,000 members of the San Carlos Apache Tribe (“Tribe”), I write to request government-to-government consultation with EPA regarding EPA’s National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review (“Copper Smelters RTR”).

Our Tribe is a federally recognized Indian tribe that has been engaged in extensive efforts to protect its members’ lives and health and its air, water, land, and treaty resources from the

many serious harms caused by copper mining and copper smelters. Of the three primary copper smelters currently operating in the United States, the two largest are both located less than ten miles from the San Carlos Apache Reservation.<sup>1</sup>

The San Carlos Apache are directly – and disproportionately – impacted by toxic emissions from copper smelters and by EPA’s decisions about how to control these emissions. To provide just one example, EPA’s demographic analysis indicates that Native Americans make up less than one percent of the population nationwide but twenty-seven percent of the population with elevated cancer risk as a result of exposure to copper smelter emissions.<sup>2</sup>

### **Tribal Consultation**

Tribal consultation, as mandated under Executive Order No. 13175,<sup>3</sup> has been further strengthened under President Biden’s policies and priorities. On the day of his inauguration President Biden issued Executive Order 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Change Crisis), which focused on public health and environmental justice.<sup>4</sup> That Executive Order provides:

Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments. Where the federal government has failed to meet that commitment in the past, it must advance environmental justice. In carrying out this charge, the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making. It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver these goals.<sup>5</sup>

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<sup>1</sup> MAP, Attachment 1 hereto.

<sup>2</sup> 87 Fed. Reg. 1616, 1641 (Jan. 11, 2022) (Table 3).

<sup>3</sup> 65 Fed. Reg. 67249 (Nov. 6, 2000).

<sup>4</sup> 86 Fed. Reg. 7037 (Jan. 20, 2021).

<sup>5</sup> *Id.*

Shortly thereafter, on January 26, 2021, President Biden issued a memorandum recognizing that Indian tribes are “sovereign governments” and that it is a priority of the Administration “to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.” In that memorandum President Biden also reaffirmed the Tribal consultation principles set out in Executive Order 13175 (Nov. 6, 2000) (Consultation and Coordination with Indian Tribal Governments).

Ultimately, EPA’s tribal consultation obligation is based on the United States’ unique trust responsibility to Indian tribes. And, importantly, there is a significant overlap in addressing environmental justice and engaging in meaningful tribal consultation. Taken together, these two orders issued from the White House affirm the Biden Administration’s promise to respect the federal Indian trust responsibility and engage with Tribes on matters that will impact tribal lands, resources, treaty rights, and tribal health.

### **Copper Smelters RTR**

According to EPA and owner-generated reports to EPA’s Toxics Release Inventory (TRI), copper smelters emit many hazardous air pollutants, including toxic metals such as lead, arsenic, and mercury as well as toxic organic chemicals such as dioxins and naphthalene. Of particular concern are the smelters’ emissions of lead and arsenic. EPA estimates that they emit 13 tons of lead and 2 tons of arsenic each year.<sup>6</sup> TRI reports indicate their emissions are even higher. Just one smelter, the Freeport-McMoran smelter in Miami, Arizona, reported emitting almost 30 tons of lead in 2018.<sup>7</sup> Based on EPA’s TRI reports, it emitted more lead into the air in 2018, 2019, and 2020 than any other industrial facility of any kind in the United States.<sup>8</sup>

Even “[a]t lower levels of exposure that cause no obvious symptoms, lead is now known to produce a spectrum of injury across multiple body systems.”<sup>9</sup> “In particular, lead can affect children’s brain development, resulting in reduced intelligence quotient (IQ), behavioural changes such as reduced attention span and increased antisocial behavior, and reduced educational attainment. Lead exposure also causes anemia, hypertension, renal impairment,

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<sup>6</sup> EPA, Residual Risk Assessment for the Primary Copper Smelting Source Category in Support of the 2021 Risk and Technology Review Proposed Rule (Feb. 2021) (“RRA”), EPA-HQ-OAR-2020-0430-0051, at 39-40 (Table 3.1-1).

<sup>7</sup> TRI Reports for top 100 emitters of lead compounds in 2018, 2019, and 2020, Attachment 2 hereto.

<sup>8</sup> *Id.*

<sup>9</sup> Fact Sheet, Lead Poisoning, WHO (Oct. 11, 2021), <https://www.who.int/en/news-room/factsheets/detail/lead-poisoning-and-health>.

immunotoxicity and toxicity to the reproductive organs. The neurological and behavioral effects of lead are believed to be irreversible.”<sup>10</sup>

To make matters worse, lead (as well as arsenic, mercury, and dioxins) is both persistent in the environment and bioaccumulative.<sup>11</sup> During the decades that the smelters in Miami and Hayden Arizona have been operating in close proximity to the San Carlos Apache Reservation, their emissions of lead, arsenic, and dioxins have been deposited here and have built up in soil, water, wildlife. Each year’s new emissions from these smelters exacerbates this contamination.

The EPA issued air toxics standards for primary copper smelters 20 years ago, in 2002.<sup>12</sup> That rule lacked any emission limits for certain emission points at copper smelters (*e.g.*, anode refiners) and for certain hazardous air pollutants that copper smelters emit (*e.g.*, mercury, dioxins, and naphthalene).<sup>13</sup> It reduced copper smelters’ vast emissions of hazardous air pollutants by less than 25 percent<sup>14</sup> and, as a result, left the San Carlos Apache largely unprotected from enormous quantities of highly toxic air pollution and allowed lead, arsenic and other persistent and bioaccumulative poisons to continue to build up in our soil, water and food.

The Clean Air Act gives EPA an opportunity and an obligation to fix inadequate air toxics rules. Eight years after promulgating an air toxics rule, the agency must ensure that it does not present unacceptable health risks and, in fact, protects public health with an ample margin of safety.<sup>15</sup> Every eight years, EPA must review its air toxics rules and must revise them “as necessary,” taking into account developments in practices processes, and control technologies.<sup>16</sup> In particular, it is “necessary” for EPA to ensure that its air toxics standards comply with the Clean Air Act.<sup>17</sup>

Regrettably, EPA has neglected its obligation to fix its defective air toxics standards for copper smelters. Although the Clean Air Act required EPA to complete its residual risk and

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<sup>10</sup> *Id.*

<sup>11</sup> EPA, *TSCA Work Plan for Chemical Assessments 2014 Update* (lead & lead compounds are listed on the Work Plan with a persistence and bioaccumulation score of 3), [https://www.epa.gov/sites/default/files/2015-01/documents/tsc\\_a\\_work\\_plan\\_chemicals\\_2014\\_update-final.pdf](https://www.epa.gov/sites/default/files/2015-01/documents/tsc_a_work_plan_chemicals_2014_update-final.pdf).

<sup>12</sup> 67 Fed. Reg. 40,478 (June 12, 2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 40,482.

<sup>15</sup> 42 U.S.C. § 7412(f)(2).

<sup>16</sup> 42 U.S.C. § 7412(d)(6).

<sup>17</sup> *Louisiana Environmental Action Network v. EPA*, 955 F.3d 1088, 1096-1098 (D.C. Cir. 2020).

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technology review of its 2002 rule no later than 2010,<sup>18</sup> the agency has not even commenced the process until now.<sup>19</sup>

Issued early this year, EPA's proposed residual risk and technology review (RTR) for copper smelters recognizes, appropriately, that the health risks from copper smelters are unacceptable.<sup>20</sup> It includes new limits for some emission points that EPA previously left unregulated as well as for mercury, a hazardous air pollutant that EPA previously left unregulated.<sup>21</sup> EPA states, however, that its proposed RTR would reduce copper smelters' total hazardous air pollutant emissions only by about 4 tons per year.<sup>22</sup> Accepting EPA's estimate that their current baseline emissions are "approximately 21 tons per year,"<sup>23</sup> that would be a reduction of less than twenty percent.

The EPA acknowledges that greater reductions could be achieved. For example, EPA states that stack emissions of toxics metals could be reduced by installing a wet electrostatic precipitator (WESP), but refused to require these reductions based on claims about the cost per ton of reductions.<sup>24</sup> Similarly, EPA acknowledges that fugitive emissions of metals could be reduced substantially but refused to require these reductions based on arguments about the cost per ton.<sup>25</sup> EPA does not even consider reductions from some of the emission points at copper smelters including, for example, stack emissions from converters. Likewise, EPA does not even mention controls for copper smelters' entirely uncontrolled emissions of organic hazardous air pollutants such as dioxins and naphthalene, even though it has been well established for more than 20 years that the agency has a clear statutory obligation to set limits for each hazardous air pollutant that they emit.<sup>26</sup>

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<sup>18</sup> 42 U.S.C. § 7412(d)(6), (f)(2).

<sup>19</sup> EPA commenced its residual risk and technology review of the 2002 Copper Smelters Rule only after being ordered to do so by a federal court. *See Community In-Power and Development Ass'n v. Pruitt*, 304 F.Supp.3d 212 (D.D.C. 2012).

<sup>20</sup> 87 Fed. Reg. 1616 (January 11, 2022).

<sup>21</sup> *Id.* at 1632.

<sup>22</sup> 87 Fed. Reg. at 1650.

<sup>23</sup> RRA at 5.

<sup>24</sup> 87 Fed. Reg. at 1633.

<sup>25</sup> *Id.* at 1633-1634.

<sup>26</sup> *See Louisiana Environmental Action Network*, 955 F.3d at 1089 (citing *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000)).

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The ultimate result of EPA's approach is a proposed RTR that would reduce copper smelters' toxic emissions by less than twenty percent, even though far greater reductions of up to ninety percent are both technically and financially "achievable" for the industry.<sup>27</sup>

The Copper Smelters RTR provides EPA with an opportunity to engage in a transparent process that respects tribal consultation, recognizes science, and advances environmental justice. EPA can do a far better job of controlling copper smelters' toxic emissions, and the San Carlos Apache need the agency to do it. The Tribe formally requests an opportunity to engage in government-to-government discussions with EPA leadership regarding this rule.

As we say in our Apache language, Ahi'yi'é (thank you) in advance for your willingness to consider this comment and to ensure tribal rights are acknowledged and protected.

Sincerely,

SAN CARLOS APACHE TRIBE



Terry Rambler  
Chairman

Enclosures

Attachment 1, MAP

Attachment 2, TRI Reports for top 100 emitters of lead compounds in 2018, 2019, and 2020

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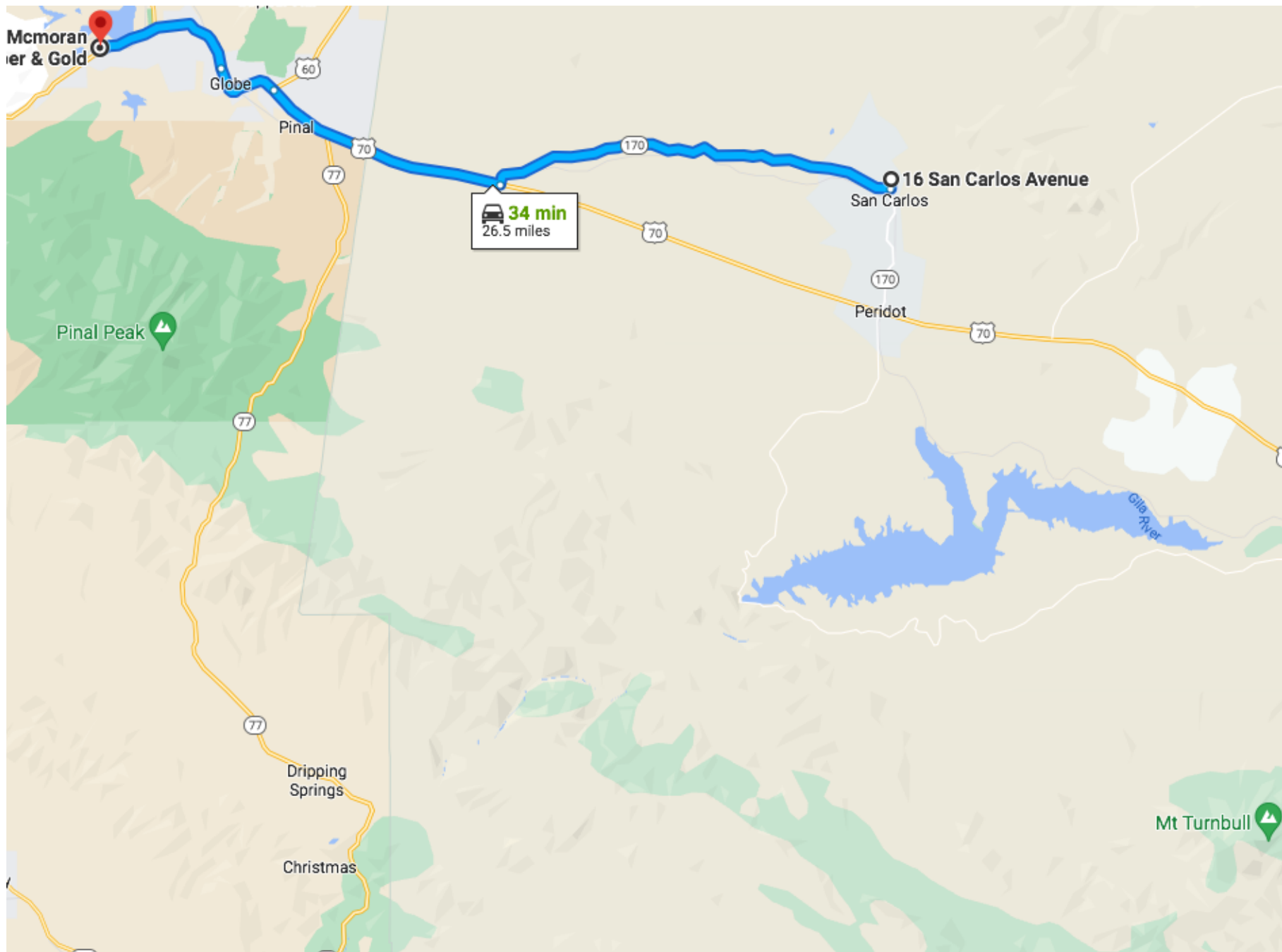
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<sup>27</sup> See 42 U.S.C. § 7412(d)(2) (requiring the "maximum" degree of reduction in emissions of hazardous air pollutants that is "achievable" considering cost).

## **Attachment 1 - Map**





## **Attachment 2 - Reports**